

Court declares websites immune

How Roommates.com case might relate to your site

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The 9th Circuit Court of Appeals, sitting en banc, in April issued a widely anticipated decision concerning the scope of immunity afforded by Section 230 of the Communications Decency Act (CDA). The Ninth Circuit's decision is the first time that a full federal appellate court has interpreted Section 230 since Congress created the federal immunity in 1996.

In a lengthy opinion, the court reaffirmed prior rulings that interpreted the statute as broadly immunizing website owners from liability based on content posted by third parties. As part of its ruling, the court also expressly agreed with the 7th Circuit's decision in the closely watched lawsuit filed against Craigslist.com.

But the majority decision introduced a new test for determining whether a website is the "developer" of mixed content, and thereby outside the scope of the Section 230 immunity. Website owners should take careful note of this decision, since under the 9th Circuit's test, if a website "materially contributes" to the allegedly illegal content, as opposed to providing "neutral" tools for communicating information, it may forfeit its immunity under Section 230. Applying this test, the court found that a housing website was not immune from claims under the federal Fair Housing Act and similar state laws that prohibit discriminatory housing practices.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, defendant Roommates.com operated a website designed to match individuals who were seeking housing. The website required users to state their own sex and sexual orientation, as well as whether they lived with children, and also required users to describe their housing preferences in these three categories. The site also allowed users to post their own content in an "additional comments" section. Profiles of users were then posted, based on the responses.

Users of the service could search profiles of potential roommates and would receive periodic e-mails informing them of available housing opportunities that matched their preferences. The Fair Housing Councils of San Fernando Valley and San Diego sued, claiming that Roommates.com was acting as a housing broker and that its website violated federal and state fair housing laws by soliciting and distributing information based on protected categories: sex, sexual orientation, and family status.

Service provider or content provider?

The district court held that Roommates.com was immune from liability under Section 230 of the CDA, which states that "[n]o provider ... of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(7). The immunity provided by the federal law thereby distinguishes "service providers" from "information content providers," who are defined as those "responsible, in whole or in part, for the creation or development of [content]." *Id.* § 230(f)(3) (emphasis added).

The 9th Circuit noted, however, that a website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

On this point, the court focused on the statutory language defining "development," reasoning that the term "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. ... [A] website helps to develop unlawful content, and thus falls within the exception to Section 230, if it contributes materially to the alleged illegality of the conduct." (Emphasis added.) The court contrasted this kind of "development" to circumstances where a website merely provides purely "neutral" tools for users (e.g., an individual using a search engine to search for "white roommate"). The court emphasized that immunity is not lost simply by asking questions, unless the questions are themselves illegal, or inevitably result in illegal responses. Finally, website operators who make minor edits to content, such as by correcting spelling or removing obscenity, enjoy immunity, whereas those who alter content to contribute to its illegality (e.g., removing words to create a defamatory impression), lose their immunity.

Using its new test, the court found that the Roommates.com website was a content provider of both its questionnaire and filtered search results. It could "claim no immunity for posting them on its website." But the court found the website immune from content posted in the "additional comments" section of user profiles, and it explicitly agreed with the 7th Circuit decision in *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, which found immune an online classified website despite user-submitted discriminatory housing advertisements. The 9th Circuit reasoned that nothing in either case "induces anyone to post any particular listing or express a preference for discrimination."

Erring on the side of immunity

Fortunately the court also emphasized that in close cases in the future, courts should err on the side of finding Section 230 immunity, "lest we cut the heart out of Section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged — or at least tacitly assented to — the illegality of third parties." In finding Roommates.com immune for content posted in the "additional comments" section, and in stating the policies behind Section 230 generally, the court made clear that website operators remain free to edit third-party content, so long as they do not do so in a way that makes it unlawful. Thus, as the en banc decision states, the message behind the decision "is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."

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